

## 2. FIREARMS TRAFFICKING AND FIREARMS TRAFFICKING LAWS

The Gun Control Act has a dual framework for keeping firearms out of the wrong hands – prohibiting certain people from possessing guns and regulating the sale of guns. A variety of provisions of the GCA are used to investigate and prosecute firearms traffickers. Unlike criminal misuse of guns, however, firearms trafficking charges can be hard to prove. This has often made cases against firearms traffickers more complicated and challenging than other kinds of gun cases.

### 2-1. Firearms Trafficking and Diversion

Because initially all crime guns start off as legally owned firearms, the term “firearms trafficking” refers to the illegal diversion of legally owned firearms from lawful commerce into unlawful commerce, often for profit. The term “trafficking” has a different meaning in the firearms context than in the context of drug trafficking, where it usually refers to the illegal manufacture, transportation, and smuggling of large quantities of illicit drugs.

#### Diversion and Stolen Firearms

ATF uses the term “diversion,” in addition to “trafficking.” “Diversion” is a broader term than “trafficking,” and encompasses any movement of firearms from the legal to the illegal marketplace through an illegal method or for an illegal purpose. For example, a criminal who steals a firearm from a licensee for his own personal use is participating in the illegal diversion of a firearm, but he is not a trafficker. Thus, while the theft of firearms may involve a criminal stealing one or more firearms for his own use, or may involve subsequent trafficking, addressing stolen firearms is an important part of a firearms trafficking strategy because theft constitutes one means of the illegal supply of firearms. In this report, “trafficking” and “diversion” are used synonymously, even though, strictly speaking, diversion is a broader term. Investigations involving gun theft are included in the report only when they also involve trafficking in stolen guns.

#### Types of Trafficking

Firearms trafficking includes:

- Trafficking in *new* firearms, interstate and intrastate, including by federally licensed

firearms dealers, large scale straw purchasers or straw purchasing rings, or small scale straw purchasers, from gun stores, gun shows, or other premises;

- Trafficking in *secondhand* firearms, interstate and intrastate, including by licensed firearms dealers, including pawnbrokers, large scale straw purchasers or straw purchasing rings; small scale straw purchasers, unlicensed sellers, including at gun shows, flea markets, or through newspaper ads, gun magazines, the Internet, and personal associations; and bartering and trading within criminal networks.
- Trafficking in new and secondhand *stolen* firearms, involving guns stolen from federally licensed dealers, including pawnbrokers, manufacturers, wholesalers, and importers, theft from common carriers, home invasions, and vehicle theft.

Firearms theft is often associated with trafficking. ATF investigates thefts from Federal firearms licensees who are required to report thefts or losses to ATF. ATF also investigates thefts from common carriers, some of which voluntarily report thefts to ATF. State and local law enforcement officials may involve ATF when there is a wave of local burglaries apparently for the purpose of obtaining firearms that may then be trafficked. Federal law does not require individual firearms owners to report the theft or loss of a firearm, though owners may report losses to local authorities and/or the FBI in order to assist law enforcement and facilitate the return of the stolen property should it be recovered.

## 2-2. Laws Prohibiting Trafficking in Firearms

One of the primary purposes of the Gun Control Act of 1968 (GCA) was to provide support to State and local law enforcement officials in their fight against violent crime and to assist them in enforcing their own firearms laws. Prior to enactment of the GCA, differences among State laws made it difficult for State and local officials to enforce their laws. Unrestricted mail-order sales of firearms and the ability of persons to acquire firearms in other less restrictive States prevented many States from effectively enforcing their laws. The GCA remedied this situation by providing a Federal scheme that channels interstate commerce in firearms through Federally licensed dealers, who are required to transfer firearms in accordance with State and local law. The interstate controls of the GCA also generally require Federal firearms licensees to transfer firearms only to residents of the State where their premises are located and restrict unlicensed persons to acquiring firearms within their State of residence. Licensees, however, may transfer long guns to non-residents if they meet in person with the purchaser and the sale complies with the applicable State laws for both buyer and seller.

The GCA also imposes a number of restrictions on persons who acquire or attempt to acquire firearms as well as restrictions on persons who dispose of firearms.

### Prohibitions on Firearms Acquisition

The GCA makes it unlawful for certain “prohibited persons,” such as convicted felons, fugitives, persons adjudicated mentally ill, and certain domestic violence offenders to possess firearms.<sup>5</sup> With limited exceptions, it is unlawful for anyone under the age of 18 to possess a

handgun. Persons who acquire firearms from FFLs must certify their eligibility to purchase firearms, and it is illegal to provide false information in purchasing a firearm. A person purchasing a firearm from an FFL may only acquire a firearm for himself or herself unless he or she is purchasing a firearm for someone else as a gift.

### Regulation of Firearms Disposition

Sales regulation is aimed at preserving a State’s authority to control commerce in firearms within its borders, as well as to help restrict supply to persons prohibited by Federal law from buying firearms. The GCA requires individuals who are engaged in the business of dealing in firearms to obtain a Federal firearms license. A condition of the Federal license is that the licensee also obeys State and local requirements governing gun sales. The GCA’s “interstate controls” make it unlawful for unlicensed individuals to sell any firearms across State lines, or for Federal firearms licensees to deliver handguns to residents of another State. An FFL may not sell a handgun to anyone under the age of 21, or a long gun to anyone under the age of 18. Since 1994, the Brady Act has required FFLs to conduct background checks to determine whether a purchaser is prohibited. FFLs are required to maintain records of the acquisition and disposition of firearms, report multiple handgun sales, report lost or stolen firearms to ATF, and provide transaction records for firearms traces initiated by law enforcement.<sup>6</sup>

## 2-3. Regulatory and Criminal Enforcement

ATF’s firearms trafficking efforts include both regulatory and criminal enforcement of these requirements. Regulatory enforcement aims to ensure FFL compliance with the GCA rules

<sup>5</sup> 18 U.S.C. § 922.

<sup>6</sup> Federal law does not require all sellers of guns to obtain a Federal firearms license. In fact, the GCA specifically provides that a person who makes “occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms” is not required to obtain a firearms license 18 U.S.C. § 922 (a) (21) (c). Unlicensed sellers are prohibited from knowingly selling a firearm to a person prohibited by law from possessing a firearm. However, they are not required to conduct Brady background checks to determine if their buyer is a prohibited person, nor are they required to maintain records that permit the firearm to be traced if it is recovered by law enforcement officials in connection with a crime.

governing the conduct of the firearms business, and focuses its inspection efforts on FFLs associated with indicators of trafficking. FFLs that violate the rules may be subject to revocation of their license, as well as to criminal prosecution. Regulatory enforcement is described in a recent ATF report.<sup>7</sup>

## 2-4. Trafficking Charges and Penalties

No section of the GCA is specifically devoted to punishing the diversion of firearms from lawful to unlawful channels. There are a variety of firearms violations that may be charged in a case involving trafficking. Certain GCA violations, however, are more relevant than others to building cases against traffickers. The charging decision often involves an assessment of the full scope of conduct, the penalties attached to particular charges, and possible defenses at trial.

The two most straightforward trafficking offenses are engaging in the business of dealing in firearms without a license, *see* 18 U.S.C. § 922(a)(1)(A), and traveling into another State to acquire a firearm in furtherance of an intent to violate section 922(a)(1)(A), *see* 18 U.S.C. § 924(n). There are many trafficking cases, however, in which neither of these statutes will be cited, primarily for two reasons. First, cases brought against unlicensed dealers under section 922(a)(1)(A) present prosecution challenges because of the statutory definition of “engaged in the business” in the 1986 amendments to the GCA.<sup>8</sup> Second, ATF firearms trace information indicates that most firearms traffickers acquire firearms in the State in which they are selling them. In such cases, section 924 (n) is not applicable.

When these two offenses are not available, alternative charges are brought. These charges

may not, at first glance, appear relevant to firearms trafficking. Depending on the facts of the case, a defendant who was engaged in trafficking may be charged with one or more of the following violations:

- The serial numbers on firearms are often obliterated to make it impossible to trace the firearms. This happens in conjunction with stolen firearms, and it is also an indicator of firearms trafficking. *If it can be established that the defendant knowingly possessed firearms with obliterated serial numbers, and the firearm has at any time been shipped or transported in interstate commerce, then the defendant may be charged with violating 18 U.S.C. § 922(k).*
- Firearms traffickers often present false identification documents to Federal firearms licensees when obtaining firearms. This ensures that the firearms cannot be traced back to the trafficker and circumvents the required Brady background check. In addition, traffickers often use “straw purchasers” to falsely represent to the licensee that they are the actual purchasers of the firearm. *If it can be established that the trafficker or “straw purchaser” lied to the licensee about a material fact, or presented a false identification document in connection with the purchase of the firearm, the trafficker or “straw purchaser” may be charged with violating 18 U.S.C. § 922(a)(6) or aiding and abetting such a violation.* Straw purchasing itself, that is, the practice of buying firearms from an unlicensed dealer on behalf of someone else, is not unlawful.
- Criminals often steal firearms for the purpose of trafficking them. *If it can be established that the firearms were stolen, and that the defendant transported the*

<sup>7</sup> *Commerce in Firearms in the United States*, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, February 2000.

<sup>8</sup> The term “engaged in the business” means . . . “as applied to a dealer in firearms, . . . a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms. . . .” 18 U.S.C. § 921(a)(21)(C).

*firearms in interstate commerce knowing or having reasonable cause to believe that they were stolen, the defendant may be charged with violating 18 U.S.C. § 922(i). If it can be established that the defendant stole the firearms from a licensee and the firearm has been shipped in interstate or foreign commerce, the defendant may be charged with violating 18 U.S.C. § 922(u).*

- Many traffickers distribute firearms to criminals and gang members knowing that the recipients intend to use the firearms for criminal purposes. *If it can be established that the defendant transferred the firearm, knowing that the firearm will be used in a crime of violence or a drug trafficking crime, the defendant may be charged with violating 18 U.S.C. § 924(h).*
- Traffickers may distribute handguns to juvenile gang members and other individuals under the age of 18. *If it can be established that the defendant transferred a handgun to an individual knowing or having reasonable cause to believe that the transferee was under the age of 18, and none of the statutory exemptions apply, the defendant may be charged with violating 18 U.S.C. § 922(x)(1).<sup>9</sup>*
- Certain “corrupt” dealers cooperate with traffickers by knowingly maintaining false records of acquisition and disposition, or failing to keep required records. *If it can be established that a firearms licensee knowingly made a false statement in required records, the licensee may be charged with violating 18 U.S.C. § 924(a)(1)(A).*
- *A person who illegally trafficks in certain weapons covered by the National Firearms Act (NFA), such as machine guns, short barrel shotguns, short barrel rifles, and silencers, can be prosecuted for violations of the NFA, 26 U.S.C. Chapter 53.*

- Finally, in some cases the individual suspected of trafficking is also a felon. While it may be difficult to prove that the defendant was engaged in the business of dealing in firearms, the evidence clearly establishes that he was a felon in possession of firearms. *If it can be established that the defendant possessed firearms after being convicted of a crime punishable by a term exceeding one year, the defendant may be charged with violating 18 U.S.C. § 922(g)(1). If it can be established that any person transferred a firearm to a prohibited person knowing or having reasonable cause to believe that the person was prohibited then the transferor may be charged with violating 18 U.S.C. 922(d). If the defendant had been convicted of three prior violent felonies or serious drug offenses, however, the defendant may receive an enhanced 15 year sentence under the Armed Career Criminal Act. 18 U.S.C. § 924(e).*

These examples are not exhaustive. Rather they illustrate the principle that not all trafficking cases involve criminal statutes readily identified as penalizing “trafficking” or involving “trafficking” charges. Although these charges are not uniquely “trafficking” charges, they are the statutory tools that investigators and prosecutors most often use in trying to punish and deter firearms traffickers. In ATF’s view, even though the perpetrator may not be charged with “trafficking in firearms,” as there is no such specific criminal violation, the goal is to get illegal traffickers off the street and prevent others from emerging, by prosecuting them to the fullest extent possible under the Federal firearms laws.

One of the conclusions drawn from the case review presented here is that persons who traffick in firearms are often not being prosecuted for that conduct; rather, they are instead being prosecuted for other related conduct.

<sup>9</sup> Exceptions from the transfer and possession prohibitions of § 922 (x) are provided for the following temporary transfers, if the juvenile has prior written consent from a parent and the consent is in the juvenile’s possession at all times: (1) employment; (2) ranching or farming; (3) target practice; (4) hunting; and (5) firearms safety instruction. Permanent transfers of handguns to juveniles are also authorized under the statute for juveniles who are members of the Armed Forces.